U.S. Department of Labor

Office of Administrative Law Judges
O'Neill Federal Building - Room 411
10 Causeway Street
Boston, MA 02222

(617) 223-9355
(617) 223-4254 (FAX)

Issue Date: 30 July 2007

CASE NO.: 2006-LHC-00593

OWCP NO.: 01-161272

In the Matter of

T. H.[1]

Claimant

v.

CIANBRO CORPORATION
Employer

and

ST. PAUL FIRE & MARINE INSURANCE COMPANY
Carrier

Appearances:

James W. Case (McTeague, Higbee, Case, Cohen, Whitney & Toker), Topsham, Maine, for the Claimant

Alison A. Denham (Douglas, Denham, Buccina & Ernst), Portland, Maine, for the Employer and Carrier

Before: Daniel F. Sutton
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

I. Statement of the Case

[1] In accordance with Claimant Name Policy which became effective on August 1, 2006, the Office of Administrative Law Judges uses a claimant's initials in published decisions in lieu of the claimant's full name. *See* Chief ALJ Memorandum dated July 3, 2006 available at http://www.oalj.dol.gov/PUBLIC/RULES_OF_PRACTICE/REFERENCES/MISCELLANEOUS/CLAIMANT_NAME_POLICY_PUBLIC_ANNOUNCEMENT.PDF.

The Claimant brings this claim against Cianbro Corporation ("Cianbro") for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, *et seq*. (the "LHWCA"), alleging that he is totally disabled due to a neck injury that he suffered while working for Cianbro on a maritime project. The parties were unable to resolve the claim during informal proceedings before the Office of Workers' Compensation Programs ("OWCP"), and the OWCP transferred the case to the Office of Administrative Law Judges ("OALJ") for a formal hearing on the claim pursuant to section 19(d) of the LHWCA. 33 U.S.C. § 919(d).

Pursuant to notice, a hearing was conducted in Portland, Maine on May 1, 2006, at which time all interested parties were afforded an opportunity to present evidence and argument. The Claimant appeared at the hearing represented by counsel, and an appearance was made on behalf of Cianbro and its workers' compensation insurance carrier, the St. Paul Fire & Marine Insurance Company ("St. Paul"). The Claimant and four other witnesses testified at the hearing, and documentary evidence was admitted without objection as Claimant's Exhibits ("CX") 1-21 and Employer Exhibits ("EX") 1-23. Hearing Transcript ("TR") at 12-13, 93-94, 187-188. At the close of the hearing both parties were granted leave to offer additional documentary evidence and testimony to be taken at depositions, and post-hearing evidence has been admitted as CX 22-26 and EX 24-28 and 30. The Claimant has objected to the admission of EX 29 which is addressed *infra*. Briefs were filed by both parties, and the record is now closed.

After careful analysis of the evidence contained in the record and the parties' arguments, I conclude that the Claimant has established entitlement to an award of compensation for a period of temporary total disability resulting from a work-related injury, medical care for this injury and attorney's fees. My findings of fact and conclusions of law are set forth below.

II. The Claim, Stipulations and Issues Presented

The Claimant seeks an award of temporary total disability compensation from April 14, 2004 to the present and continuing, medical benefits and attorney's fees. At the hearing, the parties entered into the following stipulations which I have adopted as fully supported by the record and consistent with the LHWCA:

(1) the LHWCA applies to this claim;

(2) there was an employer-employee relationship at the time of the injury;

(3) the claim for benefits and notice of controversion were timely filed;

(4) the informal conference took place on July 28, 2005;

(5) the Claimant's average weekly wage at the time of injury was $1,211.77; and

(6) the Claimant has not returned to his regular job.

JX 1. The parties also stipulated that the following issues are presented for adjudication: (1) whether the Claimant sustained a work-related injury; (2) whether the Claimant's notice of injury was timely; (3) the nature and extent of any disability; (4) whether Cianbro offered suitable alternative employment; (5) whether the Claimant is entitled to medical benefits; and (6) whether the Claimant's surgical expenses are reasonable. *Id.* In addition, there is an issue regarding the admissibility of EX 29 which the Employer sought to introduce after the close of the hearing.

III. Admissibility of EX 29

EX 29 is a one-page Cianbro document entitled "Project Separation" and dated May 31, 2006. It has the Claimant's name and employee number typed in and indicates that the Claimant's last day of work was May 16, 2006.[2] The document has an illegible signature and the date May 31, 2006 next the space for a supervisor's signature which is preceded by an account of a telephone call from the Claimant on May 16, 2006 regarding the termination of his employment. The Claimant objects to the admission of this exhibit because it has not been authenticated. The Claimant is correct. Accordingly, his objection is sustained, and EX 29 has not been admitted. 20 C.F.R. § 18.901.

IV. Findings of Fact and Conclusions of Law

A. The Claimant's Employment and Medical History

The Claimant, who was 49 years old at the time of the hearing, was hired by Cianbro in 1990 as a laborer. TR 19-21. In 1995, he became an equipment operator, and he was promoted to the position of permanent foreman in 1999. *Id.* at 21-23. As a foreman, he continued to work about 50 percent of the time and spent the other 50 percent carrying out his supervisory responsibilities. *Id.* at 23. Before he was hired by Cianbro, he worked for a year as a logger after graduating from high school in 1975. *Id.* at 95. He then completed a 100-hour course at the police academy and thereafter worked as a constable and member of a volunteer fire and rescue crew. *Id.* at 19-20.

The earliest medical records which date to 1997 indicate that the Claimant has sought treatment in the past for depression, insomnia, alcohol and tobacco abuse, possible hernia, bronchitis and headaches with migraine and cervogenic components. EX 30 at 78-82. Despite this range of problems, he was described in 1998 as an "infrequent visitor" to the primary care practice. *Id.* at 78. On November 18, 1998, he had an osteopathic examination by Tom Liscord, D.O. who noted that his neck had "significant spasm particularly in the C1-2 region" which was apparently treated with osteopathic manipulation. *Id.* On subsequent visits, Dr. Liscord noted that the Claimant had a "rotation of C2 to the left with a tender point at the occipital base and compression of the OA joint," but he reported that the Claimant felt much better and was pain free as of December 9, 1998. *Id.* at 77. There is no further mention of neck problems in the medical records until 2004.

[2] As discussed below, the Claimant made a one-day unsuccessful attempt to return to work at Cianbro on May 16, 2006.

The Claimant sought medical care in February of 2000 for intermittent left shoulder pain which he related to a football injury at age 18 and a recent flare-up while chipping ice. CX 5 at 46.[3] He was seen at the Maine Orthopaedic Center by Kenneth Moller, M.D. who diagnosed impingement syndrome of the left shoulder. *Id*. The Claimant did not respond to cortisone injections, and an open acromioplasty of the left shoulder was performed on April 4, 2000. *Id.* at 47-50. One month after surgery, Dr. Moller reported that the Claimant had recovered a full range of motion and was asymptomatic. *Id.* at 52. However, he returned to the Maine Orthopedic Center on December 18, 2000 with complaints of recurrent left shoulder pain and numbness. *Id.* at 53. At that time, he reported that he had resumed normal activities at work following the surgery but had gradually developed left shoulder pain accompanied by full arm numbness, worse at night, over the preceding few months. *Id.* It was noted that he reported difficulty using his left hand and that activities such as using a hammer or shovel seemed to increase his symptoms. *Id.* at 57-58. He underwent evaluation and was diagnosed with left carpal tunnel syndrome and left deQuervain's synovitis. *Id.* at 54-56. Carpal tunnel release surgery was performed on May 14, 2002, and his treating physician R. Reed Gramse, M.D., recommended that he remain out of work for one month. *Id.* at 59.[4] Six months later, he underwent deQuervain's release surgery which was followed a month later by a right carpal tunnel release. *Id.* at 62-65.

In the early part of 2002, Cianbro assigned the Claimant as the general foreman on its "Amethyst Project" in Portland, Maine where he was responsible for preparing a warehouse adjacent to the Maine State Pier that was to be used in connection with upcoming work on floating oil rigs. TR 27-29. He denied any neck, shoulder or arm problems when he commenced work in Portland. *Id.* at 28-29. The first part of the project involved gutting the warehouse building of its interior structures which was followed by construction of shelving to accommodate tolls and materials. *Id.* at 30-35. After the first few weeks, as containers of equipment began to arrive on the site, the Claimant performed more physical work, helping his crew unload and stock the arriving materials. *Id.* at 32, 35-37. Soon thereafter, one of the oil rigs arrived, and personnel were taken off of the Claimant's crew, causing him to increase the amount of his participation in physical tasks. *Id.* at 37-38. Eventually, the amount of physical work, including the unloading of containers which the Claimant described as challenging, increased to approximately 75 percent of the Claimant's 11-hour days. *Id.* at 41-42. Things were so busy during this phase that the Claimant testified that he often worked through breaks and lunch periods so that at least his crew could take a break. *Id.* at 44-45.

B. The Alleged Work-Related Neck Injury

A second oil rig arrived in Portland in August of 2002. TR 48. The Claimant remained in the warehouse where he was responsible for the stocking and inventory of tools and materials used in the project. *Id.* at 48-49. The Claimant testified that the amount of work increased and that the percentage of his time spent in physical activities, as opposed to paperwork, remained

[3] The record does not indicate whether the ice chipping was done at work or elsewhere.

[4] The Claimant testified that he only lost time from work following a deQuervain's release procedure that was performed in late 2001. TR 27. It is unclear whether the Claimant's memory is faulty on lost work time or whether he simply ignored Dr. Gramse's advice to take a month off after the carpal tunnel release.

constant for the remainder of the time that he was on the project. *Id.* at 48-49. He further testified that he did a lot of looking upward at materials on shelves and that he used a bicycle and forklift truck or "JCB" to get around the warehouse on a bumpy asphalt floor that caused him to feel occasional stiffness in the neck. *Id.* at 50-51. However, by the time that he was entering his second year in Portland, the Claimant began experiencing increasing pain in his neck that would radiate into his shoulders, back and arms, especially with turning and bending to lift items from the floor. *Id.* at 52-53. Although these symptoms worsened with continued work, the Claimant testified that he did nothing initially because he is not a "complainer" and thought that he simply had a stiff neck that would get better if he just backed off a little. *Id.* at 53.

The Claimant's neck symptoms did not get better, and he contacted Wayne Quint, Cianbro's on-site safety specialist in Portland, and told him that he was having problems. TR 56-57. On April 6, 2004, the Claimant, Quint and Cianbro Project Manager Jim Richards signed and "Employer's First Report of Incident" on which the Claimant indicated that the problem was ongoing and not work-related. EX 11 at 22-23. In this report, the Claimant described his problem as a "pinched nerve in back of neck affecting left shoulder, arm and hand." *Id.* at 23. Also on April 6, the Claimant was referred to Steven G. Johnson, M.D., an occupational medicine specialist, who diagnosed non-work-related cervical radiculopathy for which he prescribed ice, a cervical collar and a restriction against work above shoulder level. CX 4 at 44-45. According to Dr. Johnson's notes, the Claimant gave a history of neck symptoms for about one and one-half months. *Id.* at 44. The Claimant explained at the hearing that his neck symptoms started getting "real bad" about a month and one half before he saw Dr. Johnson. TR 57. In addition to seeing Dr. Johnson, the Claimant, apparently on his own initiative, sought chiropractic treatment on April 5, 2004 for frequent neck and left arm, wrist and hand pain from Ida M. Page, D.C. CX 19.

On April 12, 2004, the Claimant saw his primary care doctor, Brian M. Nolan, M.D. who took a history of "worsening neck and bilateral shoulder pain for the past couple of months." CX 9 at 102. Dr. Nolan's assessment was neck pain with radiculopathy, and he ordered a MRI of the cervical spine. *Id.* The MRI was done that same day and revealed a central to left paracentral disc herniation at C3-4 and a small ligamentous disc herniation at C4-5. CX 15 at 237. Dr. Nolan's notes reflect that he informed the Claimant of the MRI results and advised him to remain out of work pending further evaluation by a neurosurgeon. CX 9 at 103.

The Claimant reported to work on April 14, 2004 and attended a morning meeting with Cianbro managers whom he informed that he was in too much pain to continue working. TR 54-55, 58-59. On April 16, 2004, he filled out an application for non-occupational disability benefits in which he stated that he had been unable to work since April 14, 2004 due to ruptured cervical discs. EX 12 at 24-25; TR 59. In response to a question in the disability benefits application as to when, where and how the injury occurred, the Claimant wrote, "I believe they let go when I was going to work in my truck. I hit a bad frost heave and felt something hot in my shoulder blades." EX 12 at 24. The Claimant testified that he was referring to hitting frost heaves his pickup truck: "Well, it was April, and frost heaves were horrendous, and I'd go over a frost heave and just a little jar in the truck, it would bother me." TR 60-61, 103-104. He also testified that he had not reached any conclusion as to whether he had a work-related injury at the time that he completed to application for non-occupational disability benefits and that he had

neck pain before driving over any frost heaves. *Id.* at 59, 61. However, during cross-examination by Cianbro's attorney, the Claimant stated that he did think that his neck problems were work-related in April of 2004 and that he chose not to report it as such because he did not believe in workers' compensation. *Id.* at 104-105. He further testified that his experience with injured workers under his supervision colored his opinion about workers' compensation: "Well, Cianbro more or less drills it into you, we don't want any lost times. And, being a foreman, I'd see a lot of people with work mods, once they couldn't get healed, they'd be on indefinite layoff, or whatever." *Id.* at 106.

Dr. Nolan referred the Claimant for evaluation at Maine Spine and Rehabilitation where he was seen on April 23, 2004 by a nurse practitioner under the supervision of Nancy Ball, M.D. CX 6. The nurse practitioner obtained a detailed history from the Claimant who reported "ongoing neck, shoulder and arm pain for a couple of years" on a background of shoulder impingement, carpal tunnel syndrome and deQuervain's synovitis. *Id.* at 70. The history continues,

> As he has moved through the wrist processes and the shoulder processes, he is left with neck discomfort, pain in the parascapular region centrally and over to the left posteriorly. This has been an aching, throbbing, sometimes stabbing, sometimes numbness, and of late has had the onset of aching and throbbing in the left arm that he states starts in the cervical region and moves down. He no longer has pain and numbness in the wrists that refer upward toward the elbow that accompanied his initial carpal tunnel syndrome. He does have altered sensation in the left hand middle finger, ring finger and baby finger. Activities that make this worse are looking up, working overhead and driving. Ninety-five percent of the time that will increase the aching and throbbing in the arm and will also cause an achy pins and needles feeling and at times, if he perseveres through driving utilizing the left arm, he will go on to experience a dense numbness and heaviness. He is better when he is not driving, not lifting and utilizes heat. He has never been able to tolerate ice. The problem here is that he is a general foreman for Cianbro Construction and he is expected to lift heavy equipment, to move in and out of a cab, to do driving and to handle equipment that is jarring in nature. He states that over the last couple of weeks he has just not been able to tolerate the degree of discomfort.

Id. at 70. Dr. Ball conducted neurologic and EMG testing and concluded that there was "no evidence . . . of an acute or chronic cervical radiculopathy, plexopathy, or peripheral neuropathy. He does have trace prolongation of the median motor/sensory nerve relative to the ulnar; however, nothing that would suggest any other surgical recommendations would be pertinent." *Id.* at 73-74. She referred the Claimant to physical therapy. *Id.* at 75. The Claimant was further evaluated by another physician at Maine Spine and Rehabilitation, John Pier, M.D., who concurred in the recommendation for physical therapy and additionally expressed concerns over the Claimant's use of alcohol and tobacco which were respectively reported to be five to six beers and two packs of cigarettes daily. *Id.* at 78-79.

The Claimant commenced physical therapy on May 18, 2004. CX 3 at 8. At that time, the therapist recorded the following history:

> While no one specific injury occurred, [the Claimant] reports that he began experiencing numbness late last fall during his 75 minute rive from his home in Buckfield to his job in Portland. He states that the fingers of his left hand would go numb while driving. This gradually progressed to the point where he now has significant pain in both arms, the left more so than the right, after 15-20 minutes of any activity, even light use.

Id. The Claimant reported to Dr. Nolan that the physical therapy initially worsened his symptoms, but he was reporting "significant improvement' by June 16, 2004. CX 9 at 104-105. Dr. Nolan completed "Occupational Health Summary Work Modifications" forms for Cianbro on May 24, 2004, June 25, 2004 and August 18, 2004, and he left unanswered a question as to whether the injury was work-related or non-work-related. *Id.* at 92, 94, 98.

On July 19, 2004, the Claimant was evaluated at the Maine Orthopaedic Center by Stephen J. Barr, M.D. CX 5 at 69. Dr. Barr recommended further physical therapy as well as home stretching and, possibly, cervical traction, and he concluded that although that Claimant is not fit for "heavy-duty labor with twisting and bending at this point, but certainly he is cleared for light duty work." *Id.* Dr. Nolan adopted Dr. Barr's assessment and released the Claimant to return to Cianbro on light duty as of August 23, 2004. CX 9 at 97-98. However, Cianbro informed the Claimant that it had no suitable work available and that he could continue to collect non-occupational disability benefits until October of 2004 and then apply for Social Security disability. TR 64; CX 9 at 106. Frustrated with this impasse, the Claimant asked Dr. Nolan for a repeat MRI and an appointment with another specialist. CX 9 at 106.

On referral from Dr. Nolan, the Claimant was seen by neurosurgeon Keith B. Quattrocchi, M.D., Ph.D. on September 7, 2004. CX 13 at 186. In his report, Dr. Quattrocchi wrote that the Claimant reported significant neck pain with muscle spasm and bilateral arm pain since April of 2004. *Id.* Regarding the etiology of the neck problem, Dr. Quatrocchi continued,

> He is not aware of any specific injury at that time but does note a significant injury two years prior when working with a horse. At that time, the pain involved his neck with radiation down both arms, left side more involved than the right. The pain became quite severe, and as a result, he was unable to continue working at Cimbro [sic] in Portland.

Id. The Claimant testified that Dr. Quattrocchi's history is incorrect in that the injury that he suffered while working with a horse occurred about 12 to 15 years earlier and involved his leg and ribs, not his neck. TR 87-91.[5] The Claimant also told Peter K. Esponnette, M.D. who

[5] It is noted that Dr. Quattrocchi deleted the reference to a horse from the history that he included in a pre-surgical report on September 30, 2004. At that time, he wrote, that the Claimant "is not aware of any specific injury at that time, but does note significant injury two years prior while working. At that time, he had pain in his neck with radiation down both arms." This statement sheds no light on the history of the Claimant's injury as the record is devoid of any mention of any significant injury two years prior to April of 2004.

conducted an examination at Cianbro's request that the horse incident occurred about ten years ago and did not involve any neck pain radiating into his arm. CX 24 at 40.[6] Dr. Quattrocchi initially recommended further conservative treatment including epidural steroid injections, but he later acceded to the Claimant's request for surgery. CX 13 at 188-190; CX 14 at 208-209. The Claimant underwent anterior cervical partial corpectomies, microdissection allogenic interbody cage placement, autologous cervical harvest and grafting, DBX placement, anterior cervical plating at C3-4 and C4-5 on October 6, 2004. *Id.* at 211-213.

After he saw Dr. Quattrocchi and realized that he was facing the prospect of surgery and a protracted period out of work, the Claimant reconsidered his previous characterization of his neck problems as non-work-related. He testified that he discussed the situation with his wife, a nurse, who printed literature from the computer for him to read. TR 72. At this time, he concluded, "[t]hat I didn't do it by myself, that the job had a lot to do with it." *Id.* at 72-73. He said that he contacted Dave Gavin, a Cianbro safety or benefits manager, and asked him to file an injury report on his ruptured discs. *Id.* at 73-74.[7] He was then called by Amy Webber, a Cianbro claims adjuster, who interviewed him regarding the alleged injury. *Id.* Ms. Webber testified that she called the Claimant on September 28, 2004 at Mr. Gavin's request to obtain information on the alleged injury. TR 138-139. Ms. Webber, who took notes of the conversation which she reviewed in preparation for her testimony at the hearing, stated that the Claimant told her that he had not suffered any specific injury but felt that his cervical disc problems were due to repetitive work at Cianbro which involved lifting and twisting. *Id.* at 139-140. She testified that the Claimant stated that he had not previously reported the problem as work related because he initially thought that it was just tired muscles, but he was now facing surgery and termination of his non-occupational disability benefits. *Id.* at 141-142. She asked the Claimant why he had decided to change his report of the problem from non-work-related to work-related, and he responded that he had worked for Cianbro for a long time and had not claimed his carpal tunnel syndrome as work-related, but now felt that he was worn out and that it was time for Cianbro to pay its share. *Id.* at 142-143. The Claimant did not contradict any of Ms. Webber's testimony.

In support of his claim that his neck condition is work-related, the Claimant introduced a May 23, 2005 report from Robert N. Phelps, Jr., M.D., a board-certified orthopedic surgeon. CX 12. Dr. Phelps conducted a detailed review of the Claimant's medical records, interviewed the Claimant regarding his medical and employment history and conducted his own physical examination. His made the following diagnoses: a C3-4 disc herniation to the left; a much less significant C4-5 disc herniation; status post anterior body fusion with plate and screw fixation; myofascial pain posterior cervical and periscapular regions; lateral epicondylitis; status post deQuervain's release on the left, basically asymptomatic; status post bilateral carpal tunnel syndrome with moderate residual findings bilaterally; and status post left shoulder acromioplasty. *Id.* at 183. Dr. Phelps stated that it is his opinion that "the work activities at

---

[6] As discussed below, Dr. Esponnette outlined a different history in his report, but he clarified the account provided by the Claimant after reviewing his contemporaneous notes during his deposition.

[7] The LHWCA's implementing regulations require an employer to file report of a work-related injury, disease or death with the OWCP District Director within 10 days of the injury or the date on which the employer had knowledge of the injury. 20 C.F.R. § 702.201.

Cianbro caused the cervical disc condition, subsequent need for surgery, and current symptoms referable to his c-spine, and a major portion of his symptoms referable to his left shoulder and left upper extremity." *Id.* He added that it is his opinion that the Claimant's work activities at Cianbro aggravated his left carpal tunnel syndrome, requiring further surgery on his left wrist. *Id.*[8] Dr. Phelps opined that the Claimant had reached maximum medical improvement following his cervical fusion surgery and that he had a sedentary work capacity. *Id.* at 183-184.

Dr. Phelps's testimony was taken at a deposition on March 8, 2006. EX 22. He was asked to identify the factors that he relied upon in forming the opinion that the Claimant's work activities at Cianbro caused his cervical disc condition, and he responded,

> Well, a combination of things, including the history that [the Claimant] gave to me that he was responsible on the job for moving items weighing up to a couple of hundred pounds, that there was a lot of pushing and pulling involved, that he had to move a variety of tools, wires, extension cords, that he had to untangle the materials, and that there was a lack of any other causative factor, and that there was a contemporaneous onset of symptoms and the activities I just described.

Id. at 11. He attributed the Claimant's condition to any forceful lifting, pushing, pulling, and tugging, but agreed that there was no specific incident that stood out. *Id.* at 11-12. He also agreed that not every construction worker who performs physical labor develops herniated cervical discs and that some patients develop herniated discs simply through the degenerative aging process. *Id.* at 12. Dr. Phelps testified that the Claimant did not give him any history of traumatic neck injuries and did not mention any past injury sustained while handling a horse. *Id.* at 13-15. He was asked whether a report of an immediate sensation of something hot between the shoulder blades after hitting a frost heave in a truck is consistent with a cervical disc herniation occurring at that time, and he answered that he did not think those symptoms would necessarily be related to the cervical spine condition because the area between the shoulder blades is at the T4 level or below. *Id.* at 15-16. On cross-examination by Cianbro's attorney, Dr. Phelps acknowledged that he had been involved in disciplinary proceedings before the State of Maine Board of Licensure in Medicine, and as a result of those proceedings, he terminated his clinical practice in orthopedic surgery on January 1, 2001 and opened a full-time "medico-legal" practice. *Id.* at 26-29.[9] He testified that about five percent of his current practice involves acupuncture treatments and 95 percent non-clinical activities such as "independent" medical examinations and record reviews. *Id.* at 27. Approximately 50 percent of his "medico-legal"

[8] There is no claim for coverage of the Claimant's carpal tunnel syndrome of any treatment related to that condition.

[9] An exhibit introduced at the deposition indicates that Dr. Phelps agreed that his license to practice medicine would be placed on probation for an indefinite period beginning June 13, 2000 with conditions "based on unprofessional conduct, incompetence and a violation of the Sexual Misconduct Rules of the Board, based on inappropriate relationships with two female patients." EX 22, Deposition Exhibit 4. In a letter dated June 17, 2003 which was issued at Dr. Phelps's request, the Board of Licensure stated that "the proceedings that resulted in the Consent Agreement dated June 13, 2000 did not involve your orthopedic clinical competence." *Id.* at Deposition Exhibit 6. Dr. Phelps also obtained a letter from the vice-president of his former orthopedic group which states in relevant part that he was "on the Active Medical Staff of Penobscot Bay Medical Center from 1981 until 2001, when you stopped inpatient medicine" and that "[d]uring that time, and under the watchful eye of our Medical Staff Quality Assurance plan, you continued to be a member in good standing, practicing fully competent medicine." *Id.* at Deposition Exhibit 7.

work is performed on referral from attorneys for injured workers, and 30 percent involves Social Security disability examinations. *Id.* at 27-28. Though he characterized his workers' compensation evaluations as "about 50/50 plaintiff and defense," he agreed that the law firm representing the Claimant is his "single largest referral source of that type of exam." *Id.* at 28-29.

In response to the opinion from Dr. Phelps, Cianbro introduced an October 6, 2005 examination report from Dr. Esponnette who is board-certified in both physical and rehabilitation medicine and electrodiagnostic medicine. EX 2. He made the same diagnoses as Dr. Phelps but added chronic pain syndrome with depression, deconditioning, vocational dysfunction and "some non-organic findings on physical examination." *Id.* at 7. Based on his examination and the information provided by the Claimant, Dr. Esponnette provided the following opinion on the cause of the Claimant's cervical disc condition:

> With currently available information, it's not clear what caused the Claimant to initially have the disk extrusions (herniations) that were seen on the 4/12/04 MRI study and determined by Dr. Quattrocchi to be the primary cause of the neck and upper extremity problems. it is certainly possible that the significant heavy work that he did during the 14 years of employment with Cianbro Corporation caused or contributed to his disk herniation development. However, it is not clear that the work caused the disk herniations to occur, on a more-likely-than-not basis. It's simply in the range of likely. There is certainly potential for the other injuries, such as the horses or going over the frost heave, to be equally important if not more important causes to his neck problems. Unfortunately there's simply a great deal of uncertainty about this.
>
> On a more-likely basis, to the extent of more-likely-than-not once he developed the disk herniations, it is probably the case that his work contributed to the symptomatology to a moderate or significant degree. This would be especially true with the use of the JCB truck and the need to look around the boom, the jarring with riding in vehicles, the repetitive heavy lifting, heavy pushing, etc.. Of course, should it be determined that his cervical herniations were not caused by work, in retrospect, it would be best for the Claimant to have not done heavy capacity work.

Id. at 7. Cianbro's attorney asked Dr. Esponnette to "revisit the issue of causation regarding his cervical disk herniations" in light of additional evidence including references to the horse and frost heave incidents, and Dr. Esponette responded in a letter dated March 27, 2006. EX 19. In this letter, the doctor stated,

> As pointed out in the IME Report [EX 2], it's certainly possible that the heavy work done by [the Claimant] could cause or aggravate a disk herniation. However, with the previous problems, as well as potential other issues, such as restraining the combative horse and/or hitting a large bump in the road, it's difficult to say on a more-likely-than-not basis that his disk herniations are related to work in a significant fashion. As noted previously, though it's possible that his

work contributed or caused the disk herniations, it's not on a more-likely-than-not basis to a significant degree.

Id. at 48-49. Dr. Esponnette testified at a deposition taken on May 11, 2006. CX 24. He said that he did not think that the causation opinion that he wrote in his March 27, 2006 letter (EX 19) represented a "major change in philosophy" from his earlier opinion (EX 2). *Id.* at 13-14. On this point, the following testimony was elicited:

A. No, I really don't recall a major change in philosophy.

Q. Okay. Essentially your opinion was that there are a number of factors contributing to [the Claimant's] development of . . . cervical problems?

A. That's quite right.

Q. And work could very well have played an aggravating problem but may not have been the principle problem?

A. I think that almost totally encapsulizes or summarizes my thoughts.

Q. And have those changed based upon all of the information presented to you up until today?

A. Well, I have to admit that his chart had been tabled for a month-and-a-half and I haven't thought about it since. When I reviewed for the deposition early today, I didn't have a change of opinion.

Q. Okay. And the activities involved in his work that may have contributed or aggravated his cervical problems involved the kind of lifting he did, the kind of activities he did with his flexing his neck and driving a bicycle around the facility and things like that?

A. Well, multiple things, lifting, reaching, looking overhead, looking downwards, rotation of his neck, driving heavy equipment, et cetera.

Q. Okay. All right. You just can't point to any specific thing as the specific cause?

A. At this time, I can't.

Id. at 14-15. As noted above, Dr. Esponnette was also questioned about the reference in his report to the horse incident, and he testified, after reviewing his notes, that the Claimant told him that the episode occurred about ten years ago while "putting a halter on a horse" and that he "disputes neck pain going into the arm." *Id.* at 40, 52-53. Dr.

Esponnette conceded that he "didn't document it in the narrative quite the way he apparently told me." *Id.*[10]

C. Is the Claimant's cervical spine condition related to his employment?

To prove a causal connection and thereby establish that his cervical spine condition and any resulting disability are compensable under the LHWCA, the Claimant bears the initial burden of making out a *prima facie* case. That is, he "must at least allege an injury that arose in the course of employment as well as out of employment" and show that he "sustained physical harm and that conditions existed at work which could have caused the harm." *Bath Iron Works Corp. v. Brown*, 194 F.3d 1, 4 (1st Cir. 1999) (*Brown*), quoting *U.S. Indus./Fed. Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). "[T]he claimant is not required to show a causal connection between the harm and his working conditions, but rather must show only that the harm could have been caused by his working conditions." *Bath Iron Works Corporation v. Preston*, 380 F.3d 597, 605 (1st Cir. 2004) (*Preston*). This initial burden is not heavy, and uncontradicted, credible testimony alone may constitute sufficient proof of an injury. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 143-144 (1990).

Here, the Claimant has testified credibly and without contradiction that his work for Cianbro, particularly the work on the Amethyst Project that began in Portland during 2002, was physically demanding and required a significant amount of lifting, pushing, pulling and twisting as well as operating heavy equipment.[11] Drs. Phelps and Esponnette both opined that such activities certainly could and likely did cause or at least aggravate the Claimant's herniated cervical discs resulting in symptoms and the ultimate need for surgical intervention.[12] While

---

[10] In his October 6, 2005 report Dr. Esponnette related the following history which he now acknowledges to be at variance from what the Claimant actually told him:

> He was asked specifically about an incident in the chart, getting injured with horses. He states that he was putting a halter on his ex-wife's horse when it apparently jumped about. This resulted in neck pain going down his arm, but he indicates that it improved significantly.

EX 2 at 4.

[11] It is noted that Cianbro's questions the credibility of the Claimant's account of long hours and heavy physical labor during early 2004 inasmuch as the medical records indicate that he was on light duty following carpal tunnel release surgery and was not working "full throttle." Cianbro Brief at 12, citing CX 5 at 66-67. Dr. Barr's note of December 31, 2003 mentions a plan for the Claimant to "gradually increase his activities," but there is no evidence that the Claimant was on "light duty" at Cianbro. CX 5 at 67.

[12] Granted, Dr. Esponnette was somewhat equivocal in his March 27, 2006 letter when he stated, "though it's possible that his work contributed or caused the disk herniations, it's not on a more-likely-than-not basis to a significant degree." EX 19 at 48-49. However, he clearly acknowledged in his deposition testimony the possibility that work conditions at Cianbro could have caused or contributed to the herniated cervical discs which is enough to satisfy the First Circuit's "could have caused" standard for a *prima facie* case of causation. Since the opinions from Drs. Phelps and Esponnette both assist the Claimant in making out a *prima facie* case, I need not, at least at this stage of the analysis, address Cianbro's arguments that Dr. Phelps's opinions lack credibility because of his discipline by the Licensure Board. *See* Cianbro Brief at 10-12. This is not to say that Cianbro's position is without merit; only that an assessment of the relative credibility of the medical opinions is not necessary with respect to whether the Claimant has made out a *prima facie* case of causation because there is no material conflict between Drs. Phelps and Esponnette on this point. Drs. Phelps and Esponnette do disagree on other issues, and the matter of relative credibility will be taken up when those issues are reached.

there is evidence in the record that the genesis of the Claimant's neck problems may predate his work assignment in Portland and that there may be some contribution from non-occupational factors,[13] the aggravation doctrine recognized under the LHWCA holds that a work-related aggravation of a pre-existing condition is no less compensable than a work-related original injury. *Bath Iron Works Corp. v. Director, OWCP*, 193 F.3d 27, 31 (1st Cir. 1999), citing *Volpe v. Northeast Marine Terminals*, 671 F.2d 697, 701 (2d Cir. 1982) ("Although a preexisting condition does not constitute an injury, aggravation of a preexisting condition does."). Therefore, I find that the opinions from Drs. Phelps and Esponnette that the Claimant's work at Cianbro was capable of causing or aggravating his cervical spine condition are sufficient to establish a *prima facie* case of causation.

The potential fly in the causation ointment is the Claimant himself who has been demonstrably inconsistent in regard to whether he considered his neck condition to be work-related. In other words, is what otherwise would be a valid *prima facie* case sufficiently tainted by the Claimant's conduct to warrant denial of his claim? In my view, the answer is no. First of all, I find that it was reasonable for the Claimant to be unsure of the medical etiology of his neck symptoms given the absence of any significant traumatic event. These situations are known to confound doctors, lawyers and judges. Second, I find the Claimant's testimony, brought out on cross-examination, that he did not believe in workers' compensation to be genuine and credible, albeit regrettable for a person in a managerial position. This apparent bias is consistent with the Claimant's past disinclination to seek workers' compensation benefits for his prior shoulder and carpal tunnel problems even though such conditions are frequently considered to be occupational in nature. Thus, it is not surprising that a person with the Claimant's mindset and history of loyal employment would avoid filing for workers' compensation benefits until it became a matter of economic necessity. *See* Cianbro Brief at 10 (pointing out that the facts suggest that the Claimant decided to change his characterization of the condition to work-related when he realized that he was facing surgery and imminent expiration of his non-occupational disability benefits). Finally, and most importantly, the LHWCA is a remedial piece of legislation that must be interpreted and applied liberally to effectuate its purposes; *see Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977); and there is no precedent for penalizing a claimant by rejecting a viable *prima facie* claim for benefits simply because an injured worker may not have been completely candid with his employer in reporting a workplace accident. In my view, such circumstances are more appropriately addressed in connection with the next issue – namely, whether the Claimant gave Cianbro effective notice of his injury as required by the LHWCA. Therefore, I conclude that the Claimant has successfully established a *prima facie* case that his cervical spine condition is related to his employment at Ciambro.

Once a claimant makes out a *prima facie* case, he is entitled to a presumption that his injury or disease was caused by working conditions and is, therefore, compensable under the LHWCA. *Preston*, 380 F.3d at 605; *Brown*, 194 F.3d at 5. Consequently, the burden shifts to Cianbro, as the party opposing entitlement, to "rebut the presumption with substantial evidence that the condition was not caused or aggravated by his employment." *Bath Iron Works Corp. v. Director, OWCP*, 109 F.3d 53, 56 (1st Cir. 1997). Evidence is "substantial" if it is the kind that

---

[13] *See* Cianbro Brief at 13-14 (discussing the Claimant's work after high school as a logger and renovations that he made to his home).

a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Sprague v. Director, OWCP*, 688 F.2d 862, 865 (1st Cir. 1982). Under the substantial evidence standard, an employer does not have to exclude any possibility of a causal connection to employment, for this would be an impossible burden; it is enough that it produce medical evidence of "reasonable probabilities" of non-causation. *Bath Iron Works Corp. v. Director, OWCP,* 137 F.3d 673, 675 (1st Cir. 1998). *See also Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 289 (5th Cir. 2003) (rejecting requirement that an employer "rule out" causation or submit "unequivocal" or "specific and comprehensive" evidence to rebut the presumption and reaffirming that "the evidentiary standard for rebutting the § 20(a) presumption is the minimal requirement that an employer submit only 'substantial evidence to contrary.'"), *cert. denied*, 540 U.S. 1056 (2003). If the presumption is successfully rebutted, it no longer controls, and the administrative law judge must weigh all the evidence and render a decision supported by substantial evidence. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-287 (1935). The Claimant ultimately bears the burden of establishing causation based on the record as a whole. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 277-280 (1994).

Cianbro's rebuttal evidence consists of the opinions from Dr. Esponnette which, as discussed above, suppourt the Claimant's establishment of a *prima facie* case and, therefore, cannot constitute rebuttal of the presumed causal connection. Accordingly, I find and conclude that the Claimant's cervical spine condition that became symptomatic in 2004 arose out of and in the course of his Cianbro employment and is compensable under the LHWCA.

D. Is the claim barred by lack of timely notice?

Cianbro contends that the Claimant failed to give timely notice of his alleged injury on April 14, 2004 as required by section 12 of the LHWCA. Cianbro Brief at 9-10. Section 12 in pertinent part provides,

> Notice of an injury or death . . . shall be given within thirty days after the date of such injury or death, or thirty days after the employee or beneficiary is aware, or in the exercise of reasonable diligence or by reason of medical advice should have been aware, of a relationship between the injury or death and the employment . . . [and] [s]uch notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person . . . on his behalf.

33 U.S.C. § 912(a)-(b). As discussed above, the Claimant's testimony at the hearing suggests that he knew or at least suspected that the neck problems that put him out of work on April 14, 2004 were related to his work at Cianbro, but he declined to report a work-related injury because of his bias against the workers' compensation system and desire to avoid being considered a "complainer." Based on this testimony, I find that the Claimant, who waited until September 28, 2004 to notify Cianbro of a work-related condition, failed to provide Cianbro with timely written notice of the April 14, 2004 injury as required by sections 12(a) and (b) of the LHWCA. *See Addison v. Ryan-Walsh Stevedoring Co.*, 22 BRBS 32, 34 (1989). This finding, however, does not necessarily defeat his claim because section 12(d) further provides that,

> Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent or agents or other responsible officials or officials designated by the employer pursuant to subsection (c)) or the carrier had knowledge of the injury or death, (2) the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (3) if the deputy commissioner excuses such failure on the ground that (i) notice, while not given to a responsible official designated by the employer pursuant to subsection (c) of this section, was given to an official of the employer or the employer's insurance carrier, and that the employer or carrier was not prejudiced due to the failure to provide notice to a responsible official designated by the employer pursuant to subsection (c), or (ii) for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

33 U.S.C. § 912(d). It is presumed pursuant to section 20(b) of the LHWCA that an employer has been given sufficient notice of an injury; *Bath Iron Works Corp. v. U.S. Dept. of Labor*, 336 F.3d 51, 57 (1st Cir. 2003); and an employer claiming lack of timely notice bears the burden of proving by substantial evidence that it has been unable to effectively investigate some aspect of the claim due to the claimant's failure to provide adequate notice. *Steed v. Container Stevedoring Co*., 25 BRBS 210, 216 (1991) (affirming ALJ's finding that prejudice not shown where employer had seven months before the hearing to arrange for an independent medical exam and had access to medical records fully documenting the nature and extent of the claimant's injury). Cianbro has made no claim of actual prejudice. There is nothing in any of the medical records to suggest that there is any possibility that the Claimant's medical course might have been different had he described his neck problems as work-related at an earlier date, and Cianbro has not shown that any witness's memory dissipated, or that any document was lost, between April 14, 2004 when the Claimant was out of work and September 28, 2004 when he asked Cianbro to file a first report of injury. Accordingly, I find that Cianbro has not produced substantial evidence that it was prejudiced by the Claimant's non-compliance with the LHWCA's notice requirements. Consequently, the Claimant's failure to provide timely written notice of his occupational injury does not bar his claim.

E. What is the nature and extent of the Claimant's disability?

The LHWCA defines disability as an "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . . ." 33 U.S.C. § 902(10). This statutory definition encompasses a recognition of both the economic and medical effects of an injury. *Air America, Inc. v. Director, OWCP*, 597 F.2d 773, 777 (1st Cir.1979). Disability under the Act involves "two independent areas of analysis -- nature (or duration) of disability and degree of disability." *Stevens v. Director, OWCP*, 909 F.2d 1256, 1259 (9th Cir.1990), *cert. denied*, 498 U.S. 1073 (1991). In this case, the Claimant seeks temporary total disability compensation, and he has made no claim that his disability is permanent. *See* Claimant Brief at 10. Therefore, the issue to be addressed is the extent of any temporary disability since April 14, 2004 when the Claimant left the job on the Amethyst project in Portland.

A three-part test has been established to determine whether a claimant qualifies for a total disability award: first, a claimant must make a *prima facie* case of total disability by showing he cannot perform his former job because of job-related injury; second, if the claimant makes this showing, the burden shifts to the employer to establish that suitable alternative employment is readily available in the claimant's community for individuals with the same age, experience, and education as the claimant; and third, the claimant can rebut the showing of suitable alternative employment with evidence establishing a diligent, yet unsuccessful, attempt to obtain that type of employment. *CNA Ins. Co. v. Legrow*, 935 F.2d 430, 434 (1st Cir. 1991) (*Legrow*). The Claimant's usual employment is the general foreman's job that he was performing on the Amethyst Project at the time of injury. *See Ramirez v. Vessel Jeanne Lou, Inc*., 14 BRBS 689, 693 (1982).

Although Dr. Nolan approved the Claimant for a return to light duty work on August 23, 2004, Cianbro had no suitable work available for him, and any plan to return to work at this time later became moot when the Claimant elected to proceed with the fusion surgery. Indeed, Cianbro makes no argument that any suitable employment was available to the Claimant at any time prior to May 19, 2005 when it began to offer him alternate work assignments. *See* Cianbro Brief at 14-15. Therefore, I find that the Claimant is entitled to an award of temporary total disability compensation from April 14, 2004 through at least May 19, 2005 when the first offer of alternate employment was tendered. I will now turn to the question of the extent of the Claimant's disability since May of 2005 which is a matter of considerable dispute between the parties.

1. The Northern Wood Power Project Job

By letter dated May 19, 2005, Cianbro offered the Claimant a position as a civil foreman / truck driver at is Northern Wood Power Project in Newington, New Hampshire. EX 14. The letter explained that the position would pay the Claimant $20.00 per hour, the same rate that he received on the Amethyst project, initially on a five day, 50 hour per week schedule which was expected in increase to six days and 60-65 hours per week. *Id.* The letter further explained that the position would consist of yard supervision responsibilities and would be subject to the Claimant passing drug and fitness for duty examinations. *Id.* This offer was generated through the efforts of Michael Bennett, Cianbro's human resources manager for Northern New England, and Allison Coombs, a Cianbro personnel specialist. TR 146-155; 197-200. Mr. Bennett testified that the civil foreman / truck driver job offered to the Claimant is a generic job description and that it was his intent to return the Claimant to the same position that he left in Portland which did not require truck driving. *Id.* at 157. Ms. Coombs testified that the New Hampshire job would not require the Claimant to perform any physical labor but rather to simply supervise other employees who would perform the manual work. *Id.* at 201-202.

On May 20, 2005, the Claimant was seen by Dr. Nolan who reviewed the New Hampshire job offer and wrote,

> He will not be doing heavy lifting but will be doing a lot of traveling which is problematic as well as paper and computer work. He says just writing a single

> sheet of paper to describe his symptoms causes him significant pain. We discussed at length whether he can return to work and in light of his numerous symptoms, it does not appear to be a reasonable expectation.

CX 9 at 118. On May 23, 2005, the Claimant saw Dr. Quattrocchi who approved a return to work with restrictions and made the following comments:

> He has a supervisory position, which will not require any significant bending of his neck or any overhead work. I have looked at the form and see no definitive contraindications and I have attached to the form a work restriction form to be used to supplement that form in the event that some small detail on that rather form was missed. The patient feels that based on the form and our form, which he has looked at before, that there are no contraindications to his proceeding with work. He does wish to do so. There maybe some other generalized issues which might preclude him from being successful at this job, as he states is noted by his primary care physician and may involve tremors of his arms. Nonetheless he wishes to proceed with work and I am happy to see that the company has made some efforts to help him back into the workforce without putting his neck through any undo [sic] stress.

CX 13 at 198. At Cianbro's request, the Claimant underwent a fitness for duty examination with Robert Meyer, M.D. on May 24, 2005. CX 7. In his report, Dr. Meyer lists the job as a "driver" and stated that the Claimant was not recommended for the job because had a "condition that represents a risk of significant health impairment to the individual or others." *Id.* Dr. Meyer further stated that the Claimant could perform "light, non-safety sensitive work only." *Id.*

At the hearing, the Claimant acknowledged that the driving distance between his home and the jobsite in New Hampshire was a drawback, and he testified that he never accepted the job because he felt that he could not do it, explaining that "[the travel was the issue as much as the work was the issue.]" TR 110, 113. He also acknowledged that travel to remote jobsites is a normal condition of employment at Cianbro. *Id.* at 111. However, as it does not appear that Cianbro pursued this job offer by clarifying the nature of the duties to the Claimant after Dr. Meyer's negative recommendation, I find that it did not constitute a valid offer of suitable alternative employment.

2. The Ricker's Wharf Job

After Dr. Meyer's negative recommendation regarding the Northern Wood Power Project job in New Hampshire, Cianbro identified a new job opportunity for the Claimant on a barge project located at Ricker's Wharf in Portland, Maine. Ms. Coombs testified that she learned from the project superintendent that he needed a shipping and receiving supervisor because the project "had a lot of material coming in a very short period of time." TR 203. She also testified that the project superintendent thought that the Claimant would be perfect for this job and that he would be able to accommodate the Claimant's limitations because he would have other employees available to handle and physical duties. *Id.* at 206. By e-mail dated June 20, 2005, Mr. Bennett offered the Claimant the position of "Shipping/Receiving/Yard Coordinator" on the

barge project, noting that it was anticipated that he would eventually move into a Warehouse Coordinator position at Ricker's Wharf when the then incumbent of this position left on maternity leave. EX 15.

Dr. Nolan's office notes indicate that he saw the Claimant on June 20, 2005 to discuss the possible return to work. At this time, Dr. Nolan stated that "based primarily on his self-reported symptoms," it was his recommendation that the Claimant not return to work. CX 9 at 118.

Shortly after the June 20, 2005 e-mail, the Claimant met with Ms. Coombs and the project superintendent at Ricker's Wharf. TR 79-80, 114-116. They discussed the requirements of the job, and the Claimant testified that when he asked about the physical demands and whether he would have any help, the superintendent responded that he would have to work that out. *Id.* at 116-117. Ms. Coombs recalled that the Claimant was given more specific assurances that his limitations would be accommodated, that he would not be expected to do more than parperwork as there would be someone there to help him out, and that Cianbro would be flexible with his hours and not require overtime work. *Id.* at 207-208. It is undisputed that the Claimant stated that he was concerned about driving to the jobsite because of swelling and spasms in his hands, and the meeting concluded with the Claimant indicating that he was going to see Dr. Nolan. *Id.* at 119; 208-209. The Claimant was unsure if he could have done this job even if his duties were strictly sedentary: "As far as a desk, sitting on the phone, limited capabilities there." *Id.* at 118.

The Claimant saw Dr. Nolan on June 30, 2005 and reported that he "[c]ontinues to be debilitated by chronic neck and back pain with spasms." CX 9 at 119. He also told Dr. Nolan that driving to the job interview at Ricker's Wharf had caused him to experience severe pain." *Id.* Dr. Nolan's assessment was "Chronic neck and back, as well as left arm pain, precluding meaningful employment." *Id.* Dr. Nolan's plan was for the Claimant to increase his medication, consider acupuncture "continue pursuing his disability." *Id.* Consistent with this plan, the Claimant called Ms. Coombs and left a message that his doctor raised his prescription and that he would not be able to take the job at Ricker's Wharf. TR 80; 209.

On July 25, 2005, the Claimant saw a physician assistant at Dr. Quattrocchi's office for a six-month post-surgical follow-up and reported continuing neck pain and spasms. CX 13 at 201. Additional x-rays and MRI studies were ordered, and Dr. Quattrocchi stated in an August 15, 2005 letter to Dr. Nolan that the new imaging showed so abnormal instability. *Id.* at 202. However, Dr. Quattrocchi also stated that the Claimant for the first time reported intermittent episodes of facial numbness and drooling for the past year which raised a concern of TIA or some other central nervous system process for which he recommended neurological referral. *Id.* at 202-203. With regard to the Claimant's neck pain, Dr. Quattrocchi noted that the Claimant had "applied for disability" and stated that "[h]e has improved since surgery, but he is having residual symptomatology, which I cannot explain from an anatomical basis." *Id.* at 203.

On referral from Dr. Quattrocchi, the Claimant was seen by neurologist David M. Burke, M.D. CX 2. After physical and neurological examinations which were essentially normal, Dr. Burke's impression was "causalgia" for which he prescribed increasing dosages of Neurontin for

pain management. *Id.* at 6-7.[14] As of December 2005, Dr. Burke reported that the Claimant indicated that the Neurontin reduced his pain level from 7-8 to 3-4. *Id.* at 7. Dr. Burke has not expressed any opinion regarding the Claimant's ability to work, but Dr. Nolan continued to maintain that the Claimant is "clearly disabled from meaningful employment at this time." CX 9 at 120 (August 31, 2005 office note). *See also* CX 9 at 123 (November 21, 2005).

While Cianbro appears to have made a genuine effort to accommodate the Claimant's limitations so as to permit a successful return to work on the barge project at Ricker's Wharf, I conclude that the June 20, 2005 job offer did not constitute an offer of suitable alternative employment given the ambiguity at the time of the offer regarding the specific duties and available accommodations. *See Spencer v. Baker Agricultural Co.*, 16 BRBS 205 (1984) (employer did not meet its burden where it sent the claimant a letter offering a light duty job but never discussed the specifics of the job with him). Moreover, despite Dr. Quattrochi's qualified release of the Claimant to perform supervisory duties, I find that Dr. Nolan's opinions, which are not contradicted by any contrary contemporaneous evidence, raise a serious question as to whether the Claimant was capable of any sustained gainful employment at the time the Ricker's Wharf job was offered.

3. The Second Job Offer at Ricker's Wharf

As set forth above, the Claimant was evaluated by Dr. Esponnette who found that he has some work capacity with limitations but stated that drowsiness from medications could be a consideration and cautioned that the Claimant could not, at least initially, work more than an eight-hour day. EX 2 at 8. At the time of this evaluation, the Claimant apparently believed that the Ricker's Wharf job would involve physical demands similar to those he had encountered on the Amethyst Project as he told Dr. Esponnette that he would ride a bike around l2 miles per day and operate forklifts, reach trucks, skid steel loaders, and assist with unloading and loading as necessary. *Id.* Eventually, Cianbro offered a modified version of the Warehouse Coordinator position at Ricker's Wharf to the Claimant in a letter dated March 6, 2006. EX 16. In this letter, Mr. Bennett stated that the Claimant's pre-injury classification (civil foreman / driver) and pay rate ($20.00 per hour) would remain the same and that "overtime will not be required for this position nor will transportation relating to bicycle use since everything will be within walking distance of the warehouse." *Id.* Mr. Bennett concluded by stating that Cianbro was "fully aware of your physical restrictions as outlined in Dr. Esponnette's report and we will work you to keep you within these bounds." *Id.*

In the eight-month period between June of 2005 when the Claimant turned down the first job offer at Ricker's Wharf and the second offer on March 6, 2006, there were some significant developments in the Claimant's situation. The records from Dr. Nolan reflect an ongoing concern with the Claimant's alcohol and tobacco consumption, and Dr. Nolan diagnosed alcohol dependence on November 21, 2005 and recommended complete abstinence. CX 9 at 123.[15] It appears that the Claimant did not heed Nr. Nolan's abstinence recommendation because a February 13, 2006 office note states that the Claimant had been arrested and hospitalized for

[14] Causalgia is defined as a "burning pain, often accompanied by trophic skin changes, due to injury of a peripheral nerve, particularly the median nerve." Dorland's Illustrated Medical Dictionary (28th Ed. 1994) at 280.
[15] The Claimant has a history of treatment for alcohol abuse and depression. EX 30; TR 125.

psychiatric care a period of seven days following an alcohol-related domestic dispute in which he allegedly discharged a firearm near his home and became combative with the responding police officers. *Id.* at 125-126. On the positive side, there is evidence that the Claimant was able to engage in increased physical activities. Specifically, he was able to participate in deer hunting during the fall 2005 season, though he reported that he "pays for" any hunting over the next several days. CX 9 at 122; TR 122. In addition, he helped his son-in-law build a new house. TR 123. He testified that he initially began participating in the house building project in a supervisory or advisory capacity, but he also performed physical tasks such as sawing boards, helping install wainscoting and painting. *Id.* at 123-124.

In response to Mr. Bennett's offer, the Claimant met with Ms. Coombs at Ricker's Wharf on March 13, 2006. TR 80; 212. The Claimant testified that the drive to Portland aggravated his neck and arm pain, and he told Ms. Coombs that his hands had become swollen during the drive. *Id.* at 81-82; 212. The Claimant also spoke with Mr. Bennett who assured him that Cianbro was prepared to accommodate him in whatever way was necessary to get him back to work. *Id.* at 84. However, he called Mr. Bennett back and left a voicemail stating that he did not think the job at Ricker's Wharf would work out for him. EX 17. Mr. Bennett responded in a letter dated March 14, 2006 that he was disappointed by the Claimant's response and wanted to reiterate that Cianbro would be flexible with his work hours to allow him travel time and accommodate his need to stop en route and stretch. *Id.* He also stated the Claimant would be eligible to receive per diem payments of $25.00. *Id.* Finally, Mr. Bennett stated that that the Claimant would have to be scheduled for a pre-employment drug test should he decide to reconsider the Ricker's Wharf job and that he would also have to undergo Department of Transportation ("DOT") and fitness for duty testing if he wished to maintain his truck driving status. *Id.* In a subsequent conversation, Mr. Bennett informed the Claimant that he did not have to pass a DOT physical for clearance to operate equipment because Cianbro did not need him to perform operating duties, and the Claimant testified that he understood that he would not be expected to operate equipment if he accepted the Ricker's Wharf job. TR 169; 134.

On April 12, 2006, the Claimant called Mr. Bennett to discuss Wicker's Wharf job and any accommodations further, and the Claimant told Mr. Bennett that he would like to give the job a shot. TR 169. Mr. Bennett confirmed this conversation in a letter to the Claimant dated April 14, 2006. EX 20. In this letter, Mr. Bennett stated that the starting time could be adjusted from 7:00 a.m. to 8:00 a.m. to allow him ample time to stop and stretch during the drive to work, and he suggested as an alternative that the Claimant could use his per diem payment toward the cost of a local room so as to avoid a daily commute. *Id.* Mr. Bennett's letter also mentioned use of "stress relief mats" in areas where the Claimant would have to stand and regarding additional accommodations, he stated,

> We would like to work with you to identify what accommodation would be necessary to allow you to perform the role. If you feel you need any accommodations beyond adjustment of the starting time, please let me know as soon as possible.

Id. Mr. Bennett concluded by advising the Claimant that a pre-placement drug and fitness test had been scheduled for April 20 and that he would be expected to report to work on May 1,

2006. *Id.* The Claimant apparently questioned the necessity of the fitness for duty exam, and Mr. Bennett confirmed in a letter dated April 25, 2006 that he had informed the Claimant that the examination would not be required. EX 21. In this letter, he also adjusted the Claimant's reporting date to May 2, 2006 since the hearing was schedule for May 1st. *Id.*; TR 84.

The Claimant did not report to Ricker's Wharf on May 2, 2006 because it came to light at the hearing that Cianbro's consulting physician, Dr. Catlett, had completed a work modifications form which included the phrase "not able to return to work." CX 21. As a result of this development, Cianbro decided to defer any return to work until such time as the Claimant's medical status was clarified. TR 186; 219. In a note dated June 21, 2006, Dr. Catlett explainined that,

> [A] clerical error occurred upon the dissemination of work modifications from the Claimant following the receipt of Dr. Quattrocchi's May 23, 2005 work modification suggestions. We failed to remove the 'not able to work' restriction which had been applied earlier by Dr. Nolan but removed in Dr. Quattrocchi's later communication. His work capacity was therefore represented by Dr. Quattrocchi's May 23, 2005 communication and the work modifications listed therein.

EX 26. In addition to correcting this "clerical error" in the work modification form, Dr. Catlett communicated with Dr. Quattrocchi about the Claimant's ability to perform paperwork and computer duties requiring fine manipulation, and Dr. Quattrocchi responded on May 8, 2006 that "[p]aperwork and computer are fine. Position change 4x an hour." EX 24. In this note, Dr. Quattrocchi also referred Dr. Catlett to the work modification sheet that he had previously completed on May 23, 2005. *Id.*

After the confusion generated by the "not able to work" comment in Dr. Catlett's first Work Modifications Form was addressed, May 15, 2006 was set as the new date for the Claimant to attempt to return to work for Cianbro at Ricker's Wharf. The Claimant testified at a post-hearing deposition that he discussed a return to work with Dr. Nolan who did not think that it was a good idea, but he decided to make the attempt after speaking with Dr. Catlett who encouraged him to give it a try. CX 26 at 4. He said that the drive to Portland from his home on May 15 was physically excruciating, so much so that he had to take two rest breaks because of hand, arm and shoulder pain and swelling, and he even missed the exit for Ricker's Wharf, further prolonging what had by then become an agonizing trip. *Id.* at 8-9. He testified that he made it to Ricker's Wharf by approximately 8:00 a.m., swollen and in pain, but he managed to complete some paperwork and walk around the warehouse with the employee who was then performing the warehouse coordinator job. *Id.* at 10-16. Although he did not actually do any work, he said that his symptoms increased over the course of the morning and that he was in a lot of pain by noon. *Id.* at 17-19. He took prescribed medication at lunch and experienced some relief in his symptoms which enabled him to perform one task, obtaining a drill bit for a worker, during the afternoon. *Id.* at 20-21. However, he testified that the relief was short-lived, and he was in such a state of pain in discomfort by 3:00 p.m that he informed Ms. Coombs that he could not take any more and was going home. *Id.* at 24-25; EX 28 at 9. He has not worked since that

day. He called Ms. Coombs on May 16 and left a message that he was a "stiff as a board" and would be in touch after he had seen his doctor. EX 28 at 9.

The Claimant saw Dr. Nolan on May 17, 2006, when he reported that just walking around for one hour at Ricker's Wharf caused his body to "lock up" and feel like his neck and shoulder were in a vice. CX 22. Dr. Nolan's examination found that the Claimant's grip strength was normal, but he noted a limited range of motion in the cervical spine and shoulders and "significant muscle tension in the cervical tensor, trapezius, rhomboids and deltoids." *Id.* Dr. Nolan also noted that Dr. Burke has increased the Claimant's Neurontin dosage to "3200 mg t.i.d." *Id.* The next day, the Claimant called Ms. Coombs and told her that Dr. Nolan had advised that it was not worth it for him to return to work if he was having so much pain even with minimal physical work. EX 28 at 10.

On June 5, 2006, the Claimant returned to Dr. Esponnette's office for a follow-up evaluation. EX 23. Dr. Esponnette updated the Claimant's history, including the details of his attempt to return to work at Ricker's Wharf on May 15, and he made the following comments:

> In conclusion, [the Claimant] is continuing to have discomfort as described at length in prior reports, with history of left upper extremity cumulative trauma disorder including carpal tunnel release times two, de Quervain's release, and ongoing myofascial pain. He has right carpal tunnel syndrome, status post release. He has neck pain with previous diskectomy with subsequent fusion and plating and associated myofascial pain. He also has a history of left shoulder acromioplasty and ongoing chronic pain syndrome.
>
> He hasn't had a great deal of change since our last visit with the exception of two interventions. He has had a tremendous increase in the dosage of his Neurontin. Indeed, [the Claimant] is now taking the highest dose that I've seen for this particular medication. Furthermore, he's had a comprehensive evaluation by a well-respected psychologist who specializes in chronic pain assessment and treatment.[16]
>
> [The Claimant] is strongly encouraged to maintain a treating relationship with the above doctors. Indeed, if the involved parties still have profound concerns about the following opinions, a re-evaluation by expert in functional assessment, such as Assessment Solutions or other functional capacity evaluator.
>
> There are really no major changes in [the Claimant's] activity capacity from those expressed in the report of 10/6/05. The only addition to that previous report is the need to avoid the operation of vibratory and pneumatic equipment (due to the history of carpal tunnel syndrome).
>
> The only other issue that might be considered is the direction taken in the return-to-work efforts. [The Claimant] has essentially been out of work for over two years. The undersigned believes that he may reasonably safely return to work on a

[16] The report from the psychological examination was not introduced by either party.

> full-time basis at some point. However, return-to-work efforts may be a bit more likely to succeed, in retrospect, if he were to return to work in a graduated fashion. There would be the possibility of two major techniques. One technique would be working an abbreviated workday, five days per week versus a full workday on an alternate day basis, if the activities for work require him to travel to a worksite beyond his area of comfortable driving. (He notes that driving to Lewiston, such as for treatment, to be the maximum for reasonable comfort.)

Id. at 2-3. Dr. Esponnette concluded, "Again, it's still expected that he could do the job at Ricker's Wharf in a reasonably safe fashion, but given the long duration of out-of-work status, perhaps there is room for a bit of compromise." *Id.* at 3.

The Claimant was also seen by Dr. Burke, his treating neurologist on June 23, 2006. CX 25. Dr. Burke reported no change in the Claimant's physical examination and reported that "[t]he Neurontin decreases the pain from 10 to a 5-6 and does not have any adverse reaction to the medication." *Id.* Dr. Burke did not state any opinion regarding the Claimant's capacity for employment.

By letter dated June 22, 2006, Mr. Bennett wrote to the Claimant and offered to incorporate Dr. Esponnette's recent recommendations. EX 27. Mr. Bennetts' letter stated,

> Cianbro is willing to accommodate a work-hardening program as he [Dr. Esponnette] suggests. This could be done either working limited hours, five days per week, or working an alternating day schedule, eliminating the need to commute daily. We continue to suggest that you consider local housing during the work week, per our per diem policy. We anticipate that with medical supervision, you will be able to increase your hours to full-time in this position, as approved by Dr. Esponnette and Dr. Quattrocchi.

Id. Mr. Bennett asked the Claimant to reconsider the job offer at Ricker's Wharf and let him know by June 30, 2006 whether he planned to return to work. *Id.* The Claimant reviewed this offer at his post-hearing deposition on June 23, 2006, and he testified that he did not think that he could perform the job, even with the additional accommodations:

> Q. Would you be willing to try the job at Ricker's again with the options that Mr. Bennett proposes here that were recommended by Dr. Esponnette?
>
> A. You know, just sitting here in this deposition, I am in extreme pain, my shoulder, my neck, my arm. I see no way that I'm going to be able to work a full-time job, whether you start two hours a week or eight hours a week or forty hours a week. I've been like this since -- for two years now.
>
> Q. What is it you're being asked to do at Ricker that is more strenuous than what you do at home in the typical day that you've described to us?

A. Construction is a feast or famine. I know what it is. I know what -- I've been there, seen it, and done it. At least at home I can go off by myself. I can relax. I can lay down. I can work around the pain and not have to try to work through it all the time like I am right now.

Q. In the day you spent at Ricker's, did you do anything more strenuous or active than what you do at home in the typical day?

A. No. Other than just being tensed up, I probably didn't, but I had no means of making that pain go away, relaxing.

Q. In terms of -- in addition to the physical side of it, would you say you were somewhat stressed or nervous just starting the first day of a new job after being out of work so long?

A. Yes.

Q. Is that something that you figure would tend work itself out as you continued on a job?

A. There's always stress on a job.

CX 26 at 50-51.[17] The Claimant did not accept Cianbro's June 22, 2006 job, and there is no evidence that he ever responded to Mr. Bennett.

Cianbro contends that that it satisfied its burden of demonstrating the availability of suitable alternative employment when it offered the New Hampshire job to the Claimant in 2005 and that the Ricker's Wharf job was even more suitable. Cianbro Brief at 25-26. The Claimant disagrees and raises several arguments in support of his position that the Ricker's Wharf job was neither suitable nor available.

The Claimant's first argument is that the warehouse coordinator position at Ricker's Wharf cannot be considered available employment because the facts show that the job amounted to no more than sheltered employment. Claimant Brief at 14, citing *CNA Insurance Co. v. Legrow*, 935 F.2d 430 (1st Cir. 1991). According to the Claimant, Cianbro represented to him that he could in effect set his own hours and that the job could be tailored in any way necessary to keep him at work. *Id.* If this was a true picture of the Ricker's Wharf job, the Claimant would have a point. In *Legrow*, the Court affirmed the Benefits Review Board's finding that an injured worker's limited clerical work for his employer was the product of sheltered employment and did not qualify as suitable alternative employment, where the worker "performed the job only on an as-needed basis, averaging only approximately ten hours per week at the job, and he had a mattress in the office so that he could lie down during the day." 935 F.2d at 434. However, the

[17] The Claimant objected to Mr. Bennett's June 22, 2006 letter being introduced at his post-hearing deposition. CX 26 at 52. However, no objection was made when Cianbro offered the letter as a post-hearing exhibit. Thus, the evidence establishes that the Claimant received the June 22, 2006 letter offering further modified work at Ricker's Wharf by no later than the June 23, 2006 deposition.

facts of the instant case contrast sharply with those in *Legrow*, and they do not show that Cianbro was willing to let the Claimant set his own hours and do only work that he felt like doing. While Cianbro was willing to permit the Claimant to work reduced hours at the beginning, as suggested by Dr. Esponnette, it is clear that they expected him to be in the warehouse coordinator position on a regular, full-time basis. Moreover, Cianbro called the prior warehouse manager as a witness at the hearing, and his uncontradicted testimony convincingly shows that the warehouse coordinator position on the Ricker's Wharf project involved necessary duties that were performed before the Claimant was offered the position and continued to be performed after May 15, 2006. TR 230-249. Therefore, I find that the *Legrow* is clearly distinguishable and that the warehouse coordinator position that Cianbro offered to the Claimant at Ricker's Wharf was not sheltered job created by a beneficent employer that would not have been available on the competitive job market.

The Claimant further argues, somewhat paradoxically, that the Ricker's Wharf job, which he labels as a sheltered, do-nothing assignment, is not suitable because it is too demanding and does not accommodate all of his work restrictions. Claimant Brief at 14. In this regard, he states that although Cianbro's job offer at Ricker's Wharf was tailored to the limitations identified by Dr. Quattrocchi, Dr. Quattrocchi also stated that the Claimant would have to be cleared for any other conditions by Dr. Nolan who has not cleared the Claimant for any return to work. *Id.* The Claimant additionally contends that Dr. Quattrocchi's restrictions are related only to his cervical spine condition and do not account for any limitations related to his carpal tunnel syndrome or the drowsiness associated with his pain medications. *Id.*

While the Claimant is correct that Dr. Nolan has not cleared him for any return to work and apparently considers the Claimant to be totally disabled, his opinion is based on the Claimant's subjective complaints and is directly contradicted by the opinions from Dr. Esponnette who is a board-certified physiatrist and who had explained his opinions on the Claimant's work capacity in far greater detail than the cursory statements found in Dr. Nolan's office notes. Given Dr. Esponnette's superior qualifications and the substantially greater exposition of his reasoning set forth in his reports and deposition testimony, I find that his opinion that the Claimant has the capacity to successfully return to the Ricker's Wharf job clearly outweighs the general statements from Dr. Nolan that the Claimant continues to be disabled.[18]

The Claimant is also correct that Dr. Quattrocchi did not write restrictions based on his history of carpal tunnel and deQuervain's syndromes, but Dr. Esponnette specifically did address these limitations. EX 23 at 3 (stating that Claimant needed to "avoid the operation of vibratory and pneumatic equipment" due to his history of carpal tunnel syndrome).[19] Dr. Esponnette was

[18] It is noted that the Claimant challenges the depth of Dr. Esponnette's understanding of the Ricker's Wharf job. Claimant Brief at 14-15. However, there is no evidence that Dr. Nolan, who did not testify in this proceeding, had any knowledge of the job. Moreover, much of the Claimant's case that Dr. Esponnette didn't know what he was talking about is based on a the duties performed by the Warehouse Coordinator who was working at Ricker's Wharf in May of 2006 when the modified position was offered to the Claimant. *Id.* at 15. This person operated equipment and performed other tasks that the Claimant was repeatedly told he would not be expected to perform, so the comparison is not valid.

[19] There is no evidence or claim that Cianbro expected the Claimant to operate vibratory or pneumatic tools.

also questioned about the effects of the Claimant's pain medications and testified that they were not a contraindication to his performing the modified warehouse coordinator duties at Ricker's Wharf. CX 24 at 24-25. Noting Dr. Burke's statement that the Claimant does not have any adverse reaction to his medications and the absence of any other medical opinion in the record that the Claimant's use of pain medication would preclude him from safely working at Ricker's Wharf, I credit Dr. Esponnette's testimony on this point and conclude that the Ricker's Wharf job was suitable for the Claimant's use of medication.

Based on the foregoing assessment of the record, I conclude that Cianbro has shown that there was suitable alternative employment available to the Claimant in the form of the modified Ricker's Wharf job that was offered in Mr. Bennett's June 22, 2006 letter that he received at the deposition on June 23, 2006. *Darden v. Newport News Shipbuilding & Dry Dock Co.*, 18 BRBS 224, 226 (1986); *Swain v. Bath Iron Works Corp.*, 17 BRBS 145, 147 (1985). This work would have been available to the Claimant as of Monday, June 26, 2006 which was the first workday after the June 23, 2006 deposition. Since the Claimant rejected the offer and never attempted this job with the additional accommodations recommended by Dr. Esponnette, I further conclude that he has not rebutted Cianbro's showing that suitable employment was available.

Having determined that there was suitable alternative employment available to the Claimant as of June 26, 2006, I conclude that the Claimant was no longer totally disabled after that date and that any disability from that point forward would be partial under section 8(e) of the LHWCA based on any difference between the wages that the Claimant would have earned from the Ricker's Wharf job and his pre-injury average weekly wage which included overtime earnings. 33 U.S.C. § 908(e); *Brown v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 110, 112-113 (1989).[20]

F. What benefits are due the Claimant?

1. Compensation

For the period commencing on April 14, 2004 through June 25, 2006, the Claimant is entitled to an award of temporary total disability compensation at a rate of two-thirds of his pre-injury average weekly wage of $1,211.77. 33 U.S.C. § 908(b). This produces a compensation rate of $807.85 per week. Commencing June 26, 2006, Cianbro's demonstration that suitable alternative work was available at Ricker's Wharf reduces its liability to temporary partial disability compensation which is based on the difference between the Claimant's pre- and post-injury wage-earning capacities. Cianbro asserts that the Claimant has a post-injury wage-earning capacity of $800.00 per week; Cianbro Brief at 28; but this position ignores the fact that the job

[20] In reaching this conclusion, I am cognizant that the Claimant appears to genuinely believe that he cannot realistically return to any work for Cianbro based on his view that the nature of construction work is such that he would eventually and inevitably be required to work outside of his restrictions, thereby incurring the risk of further injury. Whether this belief is motivated by the Claimant's history of being a non-complaining and loyal employee or his past bias against injured workers with restrictions, or possibly by psychological considerations, in unclear. What is clear is that there is no basis in this record for concluding that Cianbro's offer of modified work was not made in good faith. In these circumstances and without evidence that the Claimant has been diagnosed with any work-related psychological injury that would preclude him from taking the Ricker's Wharf job, I am constrained to conclude that the weight of evidence establishes that the Ricker's Wharf job was suitable.

offered to the Claimant on June 22, 2006 was, at least initially, not full-time. Based on Dr. Esponnette's recommendation that the Claimant begin working on alternate days, I find that the Claimant would have begun the job working 24 hours per week (*i.e*., Monday, Wednesday and Friday) which would net $480.00 per week. How long this would have lasted is necessarily a matter of some speculation because the Claimant rejected the offer. However, based on Dr. Esponnette's credible medical opinion that the Claimant could work up to a full-time capacity, I find that it is reasonable to conclude for purposes of determining compensation entitlement in this matter that the Claimant would have resumed a full-time schedule after four weeks of working alternate days. Accordingly, I will award him two-thirds of the difference between his pre-injury average weekly wage of $1,211.77 and the part-time wages of $480.00 for a period of four weeks commencing on June 26, 2006. After payment of four weeks at this rate which is $487.85, I will reduce his compensation to two-thirds of the difference between $1,211.77 and the full-time wages of $800.00 which is $274.51. These temporary partial disability benefits are statutorily limited to a period of five years. 33 U.S.C. § 908(e).

2. Interest

The Claimant is entitled to pre-judgment interest on any compensation payments that were not timely made. *See Foundation Constructors v. Director, OWCP*, 950 F.2d 621, 625 (9th Cir.1991) (noting that "a dollar tomorrow is not worth as much as a dollar today" in authorizing interest awards as consistent with the remedial purposes of the Act). *See also Quave v. Progress Marine*, 912 F.2d 798, 801 (5th Cir.1990), *reh'g denied* 921 F.2d 273 (1990), *cert. denied*, 500 U.S. 916 (1991). The appropriate interest rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director.

3. Medical Care and Expenses

Pursuant to section 7(a) of the LHWCA, BIW is required to "furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The regulations implementing section 7(a) provide that medical care includes "laboratory, x-ray, and other technical services . . . recognized as appropriate by the medical profession for the care and treatment of the injury or disease." 20 C.F.R. § 702.401. The burden is on the Claimant to establish that medical expenses are related to the compensable injury. *Pardee v. Army & Air Force Exch. Serv*., 13 BRBS 1130, 1138 (1981). A claimant establishes a *prima facie* case for compensable medical treatment where a qualified physician indicates treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989); *Turner v. Chesapeake and Potomac Tel. Co.*, 16 BRBS 255, 257-258 (1984). If medical treatment is in part necessitated by a work-related condition, the entire cost of the treatment is compensable. *Turner*, 16 BRBS at 258. *See also Kelley v. Bureau of National Affairs*, 20 BRBS 169, 172 (1988). Cianbro does not challenge its liability for the medical care that the Claimant required for his neck injury in the event that it is determined, as it has been herein, that the injury is compensable, but it does argue that the hospital and surgical charges exceed the OWCP fee schedule. Cianbro Brief at 29. Thus, Cianbro requests that any order requiring payment of medical expenses be limited to the OWCP Fee Schedule.

The LHWCA provides that fees for medical examinations, treatment or services are limited to the prevailing charges in the community for such treatment and may be regulated by the Secretary of Labor who is authorized to issue regulations listing the nature and extent of medical expenses chargeable against the employer. 33 U.S.C. § 907(g). The Secretary has established an OWCP Medical Fee Schedule (*see* 20 C.F.R. § 10.411), and the regulations specify that in cases of a dispute concerning the amount of a medical bill, the Director, OWCP shall determine the prevailing community rate using the OWCP Medical Fee Schedule to the extent appropriate and where not appropriate, or the Director may use other state or federal fee schedule. 20 C.F.R. § 702.413. The regulations further provide for consideration of claims by a provider that the OWCP fee schedule does not represent the prevailing community rate under certain circumstances. 20 C.F.R. § 702.414(1) and (2). In such proceedings, the Director is required to make specific findings as to whether the fee exceeded the prevailing community charges, as established by the either OWCP fee schedule or the provider's customary charges. 20 C.F.R. § 702.414(1)(c) and (d). A provider dissatisfied with the Director's determination may request an ALJ hearing. 20 C.F.R. § 702.415.

Consistent with this scheme, Cianbro will be ordered to pay for all necessary medical care provided to date for the Claimant's work-related cervical spine injury and to provide for all required future care. If any provider is not satisfied with the amount of the payment, the procedures outlined above may be invoked.

3. Attorney's Fees

The Claimant is entitled to an award of attorney's fees under section 28 of the LHWCA because he utilized the services of an attorney in successfully establishing his right to compensation. *See Lebel v. Bath Iron Works Corp.*, 544 F.2d 1112, 1113 (1st Cir. 1976). His attorney will be allowed 30 days from the date on which this decision is filed in the office of the District Director to file an application for fees and costs, and Cianbro shall have 15 days from service of the fee application to file any objections.

V. Order

1. Cianbro and its insurance carrier, St. Paul Fire and Marine Insurance Company, shall pay the Claimant temporary total disability compensation pursuant to 33 U.S.C. § 908(b) from April 14, 2004 through June 25, 2006 at the rate of $807.85 per week;

2. Cianbro and its insurance carrier, St. Paul Fire and Marine Insurance Company, shall pay the Claimant temporary partial disability compensation pursuant to 33 U.S.C. § 908(e) beginning on June 26, 2006 at the rate of $487.85 per week for a period of four (4) weeks and thereafter at the rate of $274.51 per week until further order of the expiration of five (5) years from June 26, 2006;

3. Cianbro and its insurance carrier, St. Paul Fire and Marine Insurance Company, shall pay the Claimant interest on all past due compensation, computed from the date each payment was originally due until paid, and the appropriate rate shall be determined pursuant to 28 U.S.C. § 1961 (2003) as of the filing date of this Decision and Order with the District Director;

4. Cianbro and its insurance carrier, St. Paul Fire and Marine Insurance Company, pay for and provide all medical care pursuant to 33 U.S.C. § 907 required for the Claimant's compensable cervical spine injury, including the surgery and hospitalization for cervical fusion in October of 2004;

5. The Claimant's attorney will be allowed 30 days from the date on which this decision is filed in the office of the District Director to file an application for fees and costs, and the Respondents shall have 15 days from service of the fee application to file any objections.

6. All computations of benefits and other calculations which may be provided for in this Order are subject to verification and adjustment by the District Director.

SO ORDERED.

A

DANIEL F. SUTTON
Administrative Law Judge

Boston, Massachusetts